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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AXEL-FELIX KLEIBOEMER, *et al.*,
Petitioners,

v.

THE DISTRICT OF COLUMBIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether members of a prevailing duly certified class action were denied due process by the refusal of the trial court to order refunds of $1.8 million of illegally collected tax money to 2,711 class members?

2. Whether the *American Pipe* doctrine requires that the period for filing administrative claims for tax refunds established by District of Columbia law be tolled where the trial court upheld the tax and bound all members of the class to that judgment and where the tax is later held to be *ultra vires*?

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THE DISTRICT OF COLUMBIA,
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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner Axel-Felix Kleiboemer respectfully petitions for a writ of certiorari on behalf of the class to review the judgment of the District of Columbia Court of Appeals, entered on September 7, 1983, upholding the decision of the trial court denying the refund of $1.8 million of taxes illegally collected by the District of Columbia Government from 2,711 prevailing class members.

OPINIONS AND ORDERS BELOW

The opinion of the District of Columbia Court of Appeals holding the tax in question illegal is reported at 401 A.2d 955. The *en banc* opinion affirming the decision of the division is reported at 411 A.2d 997. The opinion of the District of Columbia Court of Appeals ruling that the respondent is not required to refund all of the tax illegally collected is reported at 458 A.2d 731 and ap-

pears in the Appendix ("App.") at 1a-12a. The supplemental opinion of the court of appeals denying petitioners' request for rehearing appears at App. 13a-21a.

JURISDICTION

The opinion of the District of Columbia Court of Appeals in this case was issued on March 22, 1983. The supplemental opinion denying petitioners' petition for rehearing was issued on September 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. Procedural Background

On October 21, 1975, Section 47-1574 of the District of Columbia Code (Supp. V 1978) became effective. Under the terms of this law the District of Columbia imposed an unincorporated business tax on unincorporated professionals and personal service businesses ("professional tax" or "commuter tax"). Pursuant to Section 47-1589e of the District of Columbia Code, respondent has the power to fine and imprison individuals who willfully refuse to pay this tax.

On March 25, 1976, petitioner Axel-Felix Kleiboemer filed his 1975 District of Columbia Unincorporated Business Tax return and paid the required tax. With his payment, petitioner Kleiboemer filed a claim for refund, contending that the tax was imposed on the "personal income" of nonresidents in violation of Section 602(a)(5) of the Home Rule Act, Section 1-147(a)(5) of the

District of Columbia Code (Supp. II, 1975). On March 26, 1976, the District of Columbia Department of Finance and Revenue denied his claim for refund.

On April 5, 1976, Kleiboemer filed a class petition seeking the refund of "all amounts paid by all taxpayers who are members of the petitioner's class pursuant to the challenged tax . . . ." By motion filed April 30, 1976, Kleiboemer moved the Superior Court for a class determination pursuant to Civil Rule 23(b)(1), as made applicable to proceedings in the Tax Division by Tax Rule 3.

The trial court entered an order dated October 17, 1977,[1] granting petitioner Kleiboemer's motion for class determination:

> FURTHER ORDERED that the class shall consist of all nonresidents who are subject to the tax in question by virtue of engaging in unincorporated personal service businesses in the District of Columbia and who have paid the tax.

Order of October 17, 1977, at 2. (App. at 23a).

The trial judge stated in detail the rationale for certifying the case as a class action under Rule 23(b)(1)(A):[2]

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[1] The order was entered on October 18, 1977. We refer to this order as the October 17, 1977, order to distinguish it from the Order and Opinion signed, dated and entered October 18, 1977, dismissing the petitions for refunds on the merits.

[2] Super. Ct. Civ. Rule 23(b)(1)(A) is identical to federal Rule 23. This rule provides:

> (b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class. . . .

> After reviewing Super. Ct. Civ. R. 23 and the applicable cases, this Court is satisfied that petitioners can maintain this action as a class action under Rule 23(b)(1)(A) and arguably under Rule 23(b)(1)(B). The Court relies only on Rule 23(b)(1)(A). *cf. McDonnell Douglas Corp.* v. *United States District Court for the Central District of California*, 523 F.2d 1083 (9th Cir. 1975); *Landau* v. *Chase Manhattan Bank, N.A.*, 367 F. Supp. 1992 (S.D.N.Y. 1973); *Goldman* v. *First National Bank of Chicago*, 56 F.R.D. 587 (N.D. Ill. 1972). Here as distinguished from the above cases, the failure to maintain a class action would impose incompatible standards of conduct on the District of Columbia. This is not a simple action for a money judgment but rather a case which calls into question a tax statute of the District. It is therefore possible that a contrary opinion could impose upon the District incompatible standards of conduct; collecting the tax from some and not from others. Moreover, this Court cannot overlook the impact on the fiscal affairs of the District of Columbia in the event of inconsistent decisions. For these reasons the Court concludes the case is properly brought under Rule 23(b)(1)(A).

(App. at 23a). In a separate order entered on October 18, 1977, the trial judge ruled that the tax was lawful and dismissed the petitions for refunds with prejudice. Each class member was bound by the trial court's order upholding the tax.

Thereafter, on October 27, 1977, the trial judge modified his order of October 18, 1977, by holding that the tax impermissibly discriminated against calendar-year taxpayers in favor of fiscal-year taxpayers and that the calendar-year taxpayers were entitled to a refund of all taxes paid by them *prior* to December 1, 1975. (App. at 24a-25a). The trial court stated that "[a]ny members of the class who were fiscal year taxpayers and had perfected their claim for refund as pro-

vided by law, would now be entitled to a refund or credit consistent with the above [opinion]. . . ." Memorandum Order of October 27, 1977, at 8. In a separate judgment order, also entered on October 27, 1977, the trial court ruled as follows:

> ORDERED that the class consists of those nonresident taxpayers who have paid the unincorporated business franchise tax pursuant to D.C. Code 1973, Sec. 47-1574b (Supp. IV, 1977) except for Richard A. Bishop (See Tax Docket No. 2362), and it is further
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> • • •
>
> ORDERED that the members of the class shall be entitled to refund of taxes, consistent with the Opinion and Order as modified by the Memorandum Order, provided they have complied with or comply with D.C. Code 1973, Sec. 47-1586j.*

* *Cf.: D.C.* v. *Keyes*, 362 A.2d 729 (D.C. App. 1976).

(App. at 24a-25a).

The first paragraph of the October 27, 1977, judgment order recited anew and did not change the class definition contained in the October 17, 1977, certification order. Thus, as of October 27, 1977, the class remained "those nonresident taxpayers who have paid the [tax] except for Richard A. Bishop."

Petitioner Kleiboemer appealed the October 18, 1977, order ruling the tax valid. Respondent appealed the October 27, 1977, order granting an 11-month refund of the tax. The District did not appeal the separate order of October 17, 1977, granting class certification and defining the class as those nonresidents who had paid the tax.[3]

[3] At no time during the briefing and oral argument before the District of Columbia Court of Appeals did the District challenge the class action certification or the October 17, 1977, definition of the class. The court of appeals in its April 20, 1979, opinion expressly recognized the class as consisting of "all nonresident professionals

In December 1978, the District of Columbia mailed a notice to those taxpayers who were continuing to pay the illegal tax, advising them of respondent's view that they were required to file claims for refund for 1975 by April 15, 1979, in the event the tax might be held illegal by a subsequent decision of the court of appeals. The District had a list of taxpayers that included the names and addresses of those individuals who did not receive the December 1978 notice; however, respondent chose not to notify these individuals by mail. As a result, a large number of taxpayers never received actual notice by mail of the purported requirement that they file a claim for refund. However, the trial court held that constitutionally adequate notice had been given to class members regarding the administrative claim requirement. (App. at 26a-28a). Petitioners filed a notice of appeal from this decision.

B. Court of Appeals Decisions

On April 20, 1979, the District of Columbia Court of Appeals unanimously held the tax on nonresident professionals and other nonresident owners of personal service businesses to be *ultra vires* as "an invalid exercise of the city council's legislative authority under the Home Rule Act." *Bishop* v. *District of Columbia*, 401 A.2d 955, 961 (D.C. App. 1979). Sitting *en banc*, the court of appeals affirmed the earlier opinion holding the tax invalid. 411 A.2d 997 (D.C.App.) (*en banc*), *cert. denied*, 446 U.S. 966 (1980). The *en banc* opinion observed that "Congress expressly and specifically withheld the District of Columbia Council's authority to impose a tax on the income of nonresidents." *Id.* 411 A.2d at 999. The trial court's judgment of October 18, 1977, denying petitioners' claims for refund of the tax paid was reversed.

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subject to the tax and who had paid the tax, except for appellant Bishop." *Bishop* v. *District of Columbia*, 401 A.2d at 956 n.5.

C. Post-Appeal Proceedings

On October 22, 1980, the trial court entered a comprehensive judgment order which provided that the "District of Columbia is directed to refund the . . . tax paid by or on behalf of petitioner Axel-Felix Kleiboemer, all members of the class . . ." The October 22 order repeated the definition of the class created by the October 17, 1977 order, that is, "all nonresident professionals . . . who have paid the tax. . . ." The District of Columbia reserved the right to argue that class members, in addition to being members of the class, were required to file individual claims for refunds within three years from the time the tax was paid to obtain the return of the money they paid pursuant to the *ultra vires* tax.[4]

On September 24, 1981, the trial court ruled that "the timely filing of individual claims [for refund under D.C. Code Section 47-1586j] by affected taxpayers is a prerequisite to refunds in this suit." This ruling denied refunds to 2,711 class members and allowed the District of Columbia to retain $1.8 million of tax money that had been illegally collected from unincorporated professionals residing outside of the District of Columbia. (App. at 29a-30a).

D. Second Appeal

The court of appeals upheld the decision of the trial court that technical compliance with Section 47-1586j was a prerequisite for obtaining a refund for the *ultra vires* tax. (App. at 1a-10a, 13a-19a). The court held that the exhaustion of remedies doctrine and the imposition of a requirement of filing individual administrative

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[4] By the time the mandate had returned to the trial court, the three-year period for filing administrative claims for refunds established by Section 47-1586j of the District of Columbia Code had expired. This section provides in pertinent part that:

> No . . . refund shall be allowed after three years from the time the tax was paid unless before the expiration of such period a claim therefor is filed by the taxpayer.

claims for refund were legitimate state interests justifying the District's refusal to refund all of the illegally collected tax. (App. at 5a-7a). Although the court had previously declared the tax unlawful, the court concluded that denial of the refunds to class members who did not file apparently futile claims for refunds did not violate due process "because the trial court decision was appealed and subject to reversal." (App. at 20a). The court of appeals also concluded that the doctrine of equitable tolling was not available to the class. (App. at 8a-10a, 18a-19a).

E. Federal Questions Properly Raised

The federal questions raised in this petition were specifically decided by the District of Columbia Court of Appeals. Petitioners argued that the Due Process Clause of the Fifth Amendment of the Constitution required the refund of all of the illegally collected tax money to *all* class members, irrespective of whether they had filed claims for refund during the period in which the tax had been upheld by a decision of the trial court. The court of appeals rejected petitioners' argument that it would be extremely harsh and fundamentally unfair "to deny refunds to some class members." (App. at 7a n.6, 20a). The Court also turned down petitioners' claim that:

> [M]embers of the class, having been bound by the trial court judgment adverse to them until this court reversed it (after the statutory period for claims expired), would be denied due process if they were denied the benefits of this court's final judgment holding the tax illegal.

(App. at 20a.)

The court of appeals also rejected petitioners' alternative argument that timely filing of the class action claim for refund tolled the statute of limitations for filing refunds under this Court's doctrine of equitable tolling as articulated in *American Pipe* and its progeny.

I. This Court should grant review because the Due Process Clause is violated by the District of Columbia's refusal to refund all of the *ultra vires*, unlawfully collected tax money.

The imposition of the professional tax in this case is a *per se* violation of petitioners' right to due process:

> [T]he exaction by a state of a tax which it is without power to impose is a taking of property without due process of law in violation of the Fourteenth Amendment.

Frick v. *Commonwealth of Pennsylvania*, 268 U.S. 473, 488-489 (1925). Where there is "no power to impose a tax, its exaction is a taking of property without due process of law. . . ." *Lee* v. *Osceola & Little River*, 268 U.S. 643, 646 (1925).

Long ago this Court made clear that a taxing authority is obligated to refund all money where payment of an illegal tax was made under compulsion. *Ward* v. *Board of County Comrs.*, 253 U.S. 17 (1920). In reaching this conclusion, the Court relied on the well-settled rule that money obtained through unlawful means may be recovered, since reaching the contrary result of allowing the taxing authority to retain the funds would be nothing short of saying that it could take or appropriate property of the taxpayer arbitrarily and without due process of law. *Id.* at 24.

In *Carpenter* v. *Shaw*, 280 U.S. 363 (1930), this Court required Oklahoma to refund a tax on Indian property that had been declared exempt from taxation by an Act of Congress; the Court did so despite the state's argument that petitioners were barred from obtaining refunds because they failed to comply with a precondition imposed by state statute requiring initial timely payment of the tax.

This Court stated: "[A] denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contradiction of the Fourteenth Amendment." *Id.* at 369. Under *Carpenter* v. *Shaw*, a state court may not deny a tax refund in a lawsuit where class members failed to comply with similar state-imposed administrative requirements for obtaining refunds of an illegally imposed tax on income declared exempt by an Act of Congress. 280 U.S. at 369.

Several years after *Shaw*, this Court affirmed a court of appeals decision upholding the right of the taxpayer to recover payments of certain taxes levied contrary to an express Act of Congress in face of an argument identical to that advanced by respondent—that is, a taxpayer who does not pursue the *exclusive* statutory remedies provided by the state may not recover the taxes paid. *Board of County Comrs.* v. *Seber*, 318 U.S. 705, 719 (1943). The court of appeals held that the right to recover taxes that are illegal and void because they are beyond the jurisdiction of the taxing authority cannot be made to depend upon any state procedural requirements, since the effect of upholding the state's requirement of compliance with its procedural requirements would deny a vested right or immunity granted by a law of the United States. 130 F.2d 663, 671 (10th Cir. 1942).

Just as the Indian lands that were the subject of litigation in *Ward*, *Shaw*, and *Seber* were specifically exempted from taxation by an Act of Congress, so also were the incomes of nonresident professionals exempted by Congress from the commuter tax levied by respondent. Petitioners have been denied their due process rights just as were the prevailing petitioners in *Ward*, *Shaw*, and *Seber*. Accordingly, the judgment of the court of appeals should be reversed.

II. This Court should grant review because application of the District of Columbia refund statute so as to deny benefits of the class action judgment is a denial of due process.

The court of appeals decision that due process is not violated by denying class members the benefit of the judgment declaring the commuter tax to be *ultra vires* is in conflict with four due process cases decided by this Court last term.

The requirements imposed by the Due Process Clause are "flexible and variable" depending on the particular factual situation. *Hewitt* v. *Helms*, 459 U.S. ——, 103 S.Ct. 846, 850 (1983). When the Due Process Clause is "invoked in a novel context," a court must "begin the inquiry with a determination of the precise nature of the private interest that is threatened by the state." *Lehr* v. *Robertson*, 463 U.S. ——, 103 S.Ct. 2985, 2990 (1983).

> [T]he courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of that interest through the procedures used as well as the probable value of additional or different safeguards, and the interest of the government in the procedures under scrutiny.

Landon v. *Plasencia*, 459 U.S. ——, 103 S.Ct. 324, 330 (1983).

> In passing judgment, the Court must not only determine the legitimacy and strength of each of these interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Anderson v. *Celebrezze*, 460 U.S. ——, 103 S.Ct. 1564, 1570 (1983). This Court must determine whether the procedures used meet the essential test of fairness under the Due Process Clause. *Landon* v. *Plasencia*, 459 U.S. at ——, 103 S.Ct. at 30. Under this due process analysis, the decision of the court of appeals should be reversed.

By virtue of the court of appeals decision, respondent may retain approximately $1.8 million of the tax money that was collected pursuant to an illegal tax. (App. at 29a-30a). Petitioners have two separate property interests that have been abridged by this decision. The first of these is petitioners' interest in the millions of dollars of taxes collected pursuant to the now invalidated tax law and the deprivation of the use of these funds since they were collected. *Board of Regents* v. *Roth*, 408 U.S. 564, 572 (1972). Petitioners have a second property interest which arises from the trial court's decision certifying the class and the ultimately favorable class action judgment of October 22, 1980.

Under Rule 23, members of a class who are not present as parties to the litigation are bound by a judgment where they are adequately represented by an individual who meets the requirements of Rule 23. *Hansberry* v. *Lee*, 311 U.S. 37, 42-43 (1940). Petitioner was found to be an "adequate" class representative and the rights of class members were fully litigated before the trial court. Class members were bound by the judgment and thus barred from filing other lawsuits in the District of Columbia or in other jurisdictions by the doctrine of *res judicata*. *Id.* *See also Laskey* v. *International Union (UAW)*, 638 F.2d 954, 956 (6th Cir. 1981); *Research Corp.* v. *Asgrow Steel Co.*, 425 F.2d 1059 (7th Cir. 1970).

Petitioners' due process property interests must be considered in light of the legitimacy and strength of the interests asserted by respondent in denying these claims for refunds. The court of appeals justified refusal to refund the illegal tax by noting that "the financial interests of the District and the public interest would not be served by allowing taxpayers in such a case to bypass statutory procedures for refund." (App. at 7a). The court reasoned that since respondent could not know the full extent of its liability for refunds and could not plan its burden accordingly, respondent had a strong interest

in requiring the filing of an administrative claim for refund. (App. at 7a). This reasoning is erroneous.

Respondent was placed on notice with the filing of the class action lawsuit for refunds filed only a short time after the tax was passed and before the first tax returns were due. The lawsuit apprised respondent of the extent of its liability because the lawsuit attacked the power of respondent to levy the tax. Thus, respondent knew the amount of money that the professional tax had brought into its treasury and the amount of money that would have to be refunded if the tax were declared illegal.

Respondent also advances the argument that its interest in the strict construction of tax refund statutes justifies retention of these funds. Allowing a refund of the illegal tax would have little or no precedential effect on future decisions of the District of Columbia courts which are asked to interpret tax laws that are not *ultra vires*. Moreover, respondent's interest in retaining the $1.8 million at issue is of dubious legitimacy, because these funds were collected illegally on the basis of a tax that is *ultra vires*.

Respondent further asserts an interest in the exhaustion of remedies doctrine (requiring that taxpayers file an administrative claim) which justifies retention of the illegally collected tax money. Whatever abstract interest a state may have in the exhaustion doctrine in the normal course, such an interest is at best minimal where the tax is *ultra vires*. Respondent's interest in imposing an exhaustion requirement is particularly weak because of the numerous exceptions to this doctrine under District of Columbia law. Exhaustion of administrative remedies is not a jurisdictional absolute; for example, taxpayers have been allowed in the past to bypass the administrative process to proceed with an action in court where, as here, the taxpayers had no meaningful abil-

ity to obtain relief at the administrative level. *District of Columbia* v. *Green*, 310 A.2d 848, 856 (D.C.App. 1973). *Accord, District of Columbia* v. *Keyes*, 362 A.2d 729, 737 (D.C.App. 1976), *cert. denied*, 430 U.S. 968 (1977). *Apartment & Office Building Ass'n.* v. *Washington*, 343 A.2d 323, 331-332 (D.C.App. 1975). Thus, respondent's interest in requiring the exhaustion of administrative remedies does not justify the retention of the illegally collected tax money.

Moreover, whatever interest respondent might have in requiring the exhaustion of administrative remedies and in strict construction of its tax statutes is mooted by the class claim for refund. On December 11, 1978, petitioner Kleiboemer filed an administrative claim for refund on behalf of all individuals in the plaintiff class. (App. at 31a-32a). The filing of a class claim for refund by the court-appointed class representative was particularly appropriate in these circumstances; class members were bound by the October 1977 judgment holding the tax lawful and any subsequent suit would have been barred by the doctrine of *res judicata*. *Hansberry* v. *Lee*, *supra*, 311 U.S. at 42-43. The class claim substantially complied with every requirement imposed by Section 47-1586j of the District of Columbia Code.[5] Under these circumstances, respondent's interest in the exhaustion of remedies doctrine and strict construction of its tax statutes is fully satisfied.

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[5] The class claim was made in writing under oath and was filed with the appropriate officials on behalf of the class as described and defined in the trial court's order of October 17, 1977. The class claim set forth the specific ground on which the claim for refund was grounded, *i.e.*, that the tax violated the Home Rule Act and was therefore *ultra vires*. (App. at 31a-32a).

On December 26, 1978, the District of Columbia Department of Finance and Revenue denied the class claim. On January 3, 1979, the trial judge ruled that the class claim did not constitute sufficient compliance with Section 47-1586j of the District of Columbia Code. On January 19, 1979, petitioners filed a notice of appeal from the order rejecting the class claim for refund.

The denial of due process is particularly egregious in these circumstances because many individuals who did not file claims for refunds never received the notice sent in December 1978 to certain taxpayers. (*See* App. at 28a, 30a). The December 1978 notice informed taxpayers that respondent intended to bar their claims if they did not file claims for refunds. Respondent actually had a list of the names and addresses of taxpayers who paid the tax, were class members, and who did not receive actual notice by mail that they might be required to file claims for refunds.

The absence of actual notice runs contrary to the basic tenet of due process that requires "at a minimum . . . that deprivation of life, liberty or property by adjudication be preceded by notice. . . ." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

> Notice by mail or other means as certain to ensure actual notice is the minimum constitutional precondition to a proceeding which will adversely affect liberty or property interests of any party, whether lettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

Mennonite Board of Missions v. *Adams*, 462 U.S. ——, 103 S.Ct. 2706, 2712 (1983). Respondent could have provided actual notice.[6]

Due process and fundamental fairness require that because all class members were bound by the trial court's judgment, respondent must be bound by the reversal of that judgment. Parties to litigation are bound with respect to every matter that is litigated. *Restatement of Judgments*, §§ 45(c), 68(i) (1942). In sum, failure to bind respondent denies petitioners their right to due process. Accordingly, the decision of the court of appeals should be reversed.

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[6] Respondent rejected as untimely the claims for refunds of $1,494,243 filed by 1,160 taxpayers for the tax years 1975 and 1976. (App. at 30a).

III. This Court should grant review because the holding of the court of appeals is inconsistent with the *American Pipe* doctrine of equitable tolling of statutes of limitation articulated in *Crown, Cork & Seal Co., Inc.* v. *Parker*.

If respondent may, consistent with due process, require individual claims for refunds under Section 47-1586j of the District of Columbia Code, the doctrine of equitable tolling of statutes of limitations is applicable to these facts.[7] The decision holding that Section 47-1586j mandates individual claims for refund by all class members would deprive class members of the benefit of class membership simply because these individuals did not file an apparently futile administrative claim for refund. Such a ruling in effect decertifies the class after final judgment and excludes class members from the benefit of the decision that the tax was *ultra vires*.

To protect the policies behind the class action procedure, this Court held:

> [T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.

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[7] Petitioners believe their claim to equitable tolling of the statute of limitations raises an issue of great significance that is a matter of general nationwide application. Even if the court of appeals decision is a matter of "state" law, this Court is "not prevented from reviewing decisions of the District of Columbia Court of Appeals in the same jurisdictional sense that [the Court] is barred from reviewing a state court's interpretation of a state statute." *Whalen* v. *United States*, 445 U.S. 684, 687-688 (1980) (citations omitted). Deference to the court of appeals' construction of local federal legislation is inappropriate in "exceptional situations where egregious error has been committed." *Pernell* v. *Southhall Realty*, 416 U.S. 363, 369 (1974) (citations omitted).

The class action rule of the trial court—which is identical to Fed.R.Civ. Pro. 23—was made applicable to the Tax Division of the Superior Court by Public Law 93-407.

American Pipe & Construction Co. v. *Utah*, 414 U.S. 538, 554 (1974), cited in *Crown, Cork & Seal Co., Inc.* v. *Parker*, 462 U.S. ——, 103 S.Ct. 2382, 2395 (1983). "The filing of a class action tolls the statute of limitation as to all asserted members of the class." 103 S.Ct. at 2395 (citation omitted). Thus, the statute of limitations with respect to the claims of the class should be extended from the time the class action was filed until the time of decertification of the class.

In further explaining the doctrine of equitable tolling articulated in *American Pipe*, this Court has rejected arguments similar to those made by respondent regarding the adequacy of notice. *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977). In *McDonald*, the Court upheld the adequacy of the notice to the defendant provided by the class action complaint, noting that "[t]he lawsuit had been commenced by the timely filing of a complaint for classwide relief, providing [the defendant] with 'the essential information necessary to determine both the subject matter and size of the prospective litigation.'" *Id.* at 392-93, quoting *American Pipe*, 414 U.S. at 555.

The doctrine of equitable tolling has also been applied in class actions to toll time requirements for filing administrative claims. For example, once a member of a class files a complaint with the Equal Employment Opportunity Commission in a Title VII case, the administrative requirement of filing a claim under 42 U.S.C. § 2000e-5(d) is tolled as to all members of the class if the class is ultimately certified and as to all purported class members if the class is not certified, or is subsequently decertified. *See Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982). *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975).

The application of the equitable tolling doctrine of *American Pipe* and its progeny to this case is particularly appropriate.

> To hold to the contrary would frustrate the principal function of a class suit, because then the sole means by which members of the class could assure their participation in the judgment if notice of the class suit did not reach them until after the running of the limitation period would be to file earlier individual motions to join or intervene as parties—precisely the multiplicity of activity which Rule 23 was designed to avoid in those cases where a class action is found 'superior to other available methods for the fair and efficient adjudication of the controversy.' Rule 23(b)(3).
>
> We think no different a standard should apply to those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed) . . . . It follows that even as to asserted class members who were unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings, the later running of the applicable statute of limitations does not bar participation in the class action and in its ultimate judgment.

American Pipe, 414 U.S. at 551-52 (footnote omitted).

When, as here, the time period for filing administrative claims has expired five days *prior* to the court of appeals' decision invalidating the tax, failure to toll the three-year period would "frustrate the principal function of a class suit . . . ." *Id.* at 551. Moreover, the sole purpose for the three-year period in the statute is, like the purpose of the limitation statute tolled in *American Pipe*, to require action to be taken within a certain time, namely, to notify respondent within three years from the payment of a tax that the taxpayer seeks a refund and the grounds therefor. Petitioner Kleiboemer did this, both for himself and for members of the class, within months after the first payment of estimated tax had been due, and *before* the first tax returns were due.

Thus, the imposition of the three-year period here would not promote the purpose of the statute.

Just as the Court squarely rejected the argument that *American Pipe* doctrine should be limited to extending the statute of limitations to intervenors or that exhaustion of remedies is required in class actions under Title VII, so also should this Court recognize the application of the doctrine of equitable tolling on these facts.

In the absence of equitable tolling, those taxpayers who paid the professional tax would be unable to obtain the return of the funds that had been illegally taken from them. Failure to require the return of all of the illegally collected tax would reward the District of Columbia for its *ultra vires* action.

In sum, if individual claims for refund under Section 47-1586j of the District of Columbia Code are consistent with due process, fundamental fairness requires equitable tolling of the statutes of limitations for filing administrative claims for refunds of the *ultra vires* tax from the filing of the class action petition for refund on April 6, 1976, to the date of this Court's ruling.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the District of Columbia Court of Appeals should be reversed because respondent's refusal to refund all of the money collected under the *ultra vires* tax denies class members due process. Alternatively, if the Court does not conclude that denial of refunds of the illegal tax to all class members automatically violates the Due Process Clause of the Constitution, the Court should grant a writ of certiorari to rule that the doctrine of equitable tolling applies to these facts.

Respectfully submitted,

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APPENDICES

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 79-123, 79-547, and 81-1232

AXEL-FELIX KLEIBOEMER, RICHARD A. BISHOP, *et al.*,
Appellants,

v.

DISTRICT OF COLUMBIA,
Appellee.

Appeal from the Superior Court of the
District of Columbia
Civil Division

(Hon. John D. Fauntleroy, Trial Judge)

(Argued November 3, 1982 Decided March 22, 1983)

Bradley G. McDonald, with whom *Philip L. Kellogg*, *James L. Lyons*, *John M. Bixler*, and *Ronald D. Aucutt* were on the briefs, for appellants.

Richard L. Aguglia, Assistant Corporation Counsel, with whom *Judith W. Rogers*, Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel, and *James E. Lemert*, Assistant Corporation Counsel, were on the brief, for appellee.

Before KERN, PRYOR and BELSON, *Associate Judges.*

KERN, *Associate Judge*: This appeal is the residuum of the convoluted litigation which ultimately resulted in a decision by this court en banc (one judge dissenting) that the City Council had impermissibly imposed a tax on nonresident unincorporated professionals and personal service businesses. *Bishop v. District of Columbia*, 411 A.2d 997 (en banc), *cert. denied*, 446 U.S. 966 (1980).

Questions of statutory interpretation are presented in this appeal: the meaning and applicability to the instant

case of D.C. Code § 47-1586j(a) (1973), requiring a taxpayer to file an administrative claim of overpayment of tax within a fixed period of time, and D.C. Code § 47-2413(c) (1973), providing for the payment of interest on overpayments of taxes.

I

The events pertinent to this appeal occurred as follows. In March 1976, appellant Kleiboemer paid the now invalidated tax and promptly filed an individual administrative claim for refund, which the District denied. Thereupon, he filed a class action petition for refund in the Tax Division of the Superior Court seeking a refund of "all amounts paid by all taxpayers who are members of the petitioner's class." (Record at 16.) In October 1977, the trial court granted appellant's motion for class action determination, pursuant to Super. Ct. Civ. R. 23(b)(1)(A)[1] and ordered that

> the class shall consist of all nonresidents who are subject to the tax in question . . . and who have paid the tax.

(Record at 47.) The trial court during October 1977 entered two further orders holding the tax unlawful but declaring that appellant Kleiboemer and members of the class who were fiscal year taxpayers were entitled to a refund for all taxes paid prior to December 1, 1975, "provided they have complied with or comply with . . . § 47-1586j." (Record at 82.)

It is agreed by the parties that if § 47-1586j is applicable to all nonresident taxpayers who paid the tax in

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[1] The rule provides in pertinent part:

> An action may be maintained as a class action if . . . the prosecution of separate actions by . . . individual members of the class would create a risk of . . . inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class. . . .

1975, their claims for refund must have been filed by April 15, 1979. In December 1978, appellant Kleiboemer filed with the District, on behalf of the class, a claim for refund, which the District denied. Soon thereafter, the trial court ruled that the class claim for refund filed by appellant Kleiboemer did not comply with the provisions of § 47-1586j, but concluded that "individual notice to the members of the class of the statutory requirement to file a claim for refund is appropriate." (Record at 110.) Notice of the filing requirement was then included in the District's mailing of 1978 tax return forms. However, some erstwhile members of the class did not actually receive the mailing, because they no longer operated unincorporated businesses in the District and hence were no longer obligated to file a return. Accordingly, the court in March 1979 directed the District to issue a press release to publicize the need by those who had paid the tax for 1975 to file a refund claim by April 15, 1979. On April 5, 1979, the court held that sufficient notice had been given to the class members regarding the administrative claim requirement. (Record at 138.) On April 15, the filing deadline for the 1975 tax year expired.

After the tax was held invalid, first by a division of this court, then by the full court en banc, the parties entered into a consent judgment, pursuant to which the class members were again notified, by a mailing, of the requirement that they file an administrative claim. At the time of that second mailing, however, the filing deadline for taxable years 1975 and 1976 had already expired.

On September 24, 1981, the trial court ruled as follows on the issues which had been left unresolved by the earlier consent judgment: (1) that "the timely filing of individual claims [for refund] at the administrative level by affected taxpayers is a prerequisite to refunds in this suit"; and (2) that interest should be computed "from the date such individual claims are timely filed until the date of the making of the refund." (Record at 176.)

It is from these September 24 rulings that the present appeal is taken.

II

As to the requirement of an individual claim for refund, § 47-1586j(a) provides in pertinent part as follows:

> No . . . refund shall be allowed after three years from the time the tax was paid unless before the expiration of such period a claim therefor is filed by the taxpayer . . . .

It is agreed that a number of nonresidents who paid the tax for the years 1975 and/or 1976 did *not* file a claim for refund of such tax payments within three years. Appellants, however, urge that the whole purpose of a class action pursuant to Rule 23(b)(1)(A)—to eliminate the possibility of inconsistent adjudications if each member of the class were to sue individually—is frustrated by requiring that *each* taxpayer who is a member of the class must have filed an administrative refund claim in order to obtain a refund after the tax has been judicially determined to be unlawful. However, in *District of Columbia v. Keyes*, 362 A.2d 729 (D.C. 1976), *cert. denied*, 430 U.S. 968 (1977), we held that a class action [2] for

[2] It is not significant that *Keyes* did not involve a certified class action. The rules of the Tax Division at that time did not include class certification procedures; however, the court in *Keyes* recognized that new class action rules had been adopted and specifically stated that "this decision may be considered to have precedential effect in future class action tax refund cases." *Id.* at 732 n.5, 736. Further, as pointed out in the District's brief, at the time Congress directed the Superior Court to adopt class action rules for tax cases, the federal courts consistently held that the filing of an administrative claim was a prerequisite to recover refunds. *See, e.g., Heisler v. United States*, 463 F.2d 375 (9th Cir. 1972) (per curiam), *cert. denied*, 410 U.S. 927 (1973) (class action); *McConnell v. United States*, 295 F. Supp. 605 (E.D. Tenn. 1969) (class action). There is no reason to believe that Congress intended a different rule for the District of Columbia. *See* District of Columbia Real Property Tax Revision Act of 1974, Pub. L. No. 93-407, § 428, 88 Stat. 1036, 1057 (1974).

refund of taxes paid was incorrectly entertained by the trial court because the taxpayers seeking refund had *not* first filed an administrative claim for refund.

Appellants contend (Brief at 18) that the trial court's ruling "would undercut the policy of Rule 23 . . . to allow class representatives to vindicate the rights of those who lack the knowledge or resources to pursue a remedy individually and to obtain justice in the courts." However, as we pointed out in *Keyes*, the Congress enacted specific legislation in § 47-1586j requiring an individual to file a refund claim and we may not ignore such a legislative mandate.[3] This is particularly true since, as we explained in *Keyes*, *supra*, 362 A.2d at 732, the remedy is purely statutory: "[r]ecovery of taxes illegally or erroneously assessed and voluntarily paid . . . is a matter within the purview of the legislative branch." We further noted, "Tax statutes are necessarily formalistic and often technical. It is essential that we adhere to their technicalities, even if at times a seeming hardship results to the taxpayer." *Id.* at 737. This is so particularly because the statutory prerequisite of a claim for refund is jurisdictional, as we also noted in *Keyes*. *Id.* at 733.[4]

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[3] We note that the trial court did require the District to notify taxpayers by public announcement of the need to file their refund claims within a certain time period, and that the trial court later held that the taxpayers had had reasonable and sufficient notice. Under these circumstances, the members of the class must be deemed to have the knowledge to take the steps required by statute.

[4] Accordingly, we cannot agree either with appellants' argument that, even if an administrative claim must be filed, the claim for refund filed by appellant Kleiboemer on behalf of the entire class satisfies the requirements of § 47-1586j. The statute plainly states that the claim must be filed "by the taxpayer." Moreover, the trial court specifically ruled on January 3, 1979, that Kleiboemer's claim for refund on behalf of the class did not comply with § 47-1586j or with the order of October 27, 1977 requiring compliance with § 47-1586j. Appellants did not appeal from the January 3 order. *Dellums v. Powell*, 184 U.S. App. D.C. 324, 566 F.2d 216 (1977), *cert. denied*, 438 U.S. 916 (1978), cited in appellants' reply brief, is

Appellants also maintain that in this case *Keyes* does not require the filing of individual claims for refund by members of the class because the filing requirement—essentially an application of the doctrine of exhaustion of remedies—need not be met when resort to the administrative process would be futile. However, we specifically rejected that argument in *Keyes*. There we acknowledged that, in *District of Columbia v. Green*, 310 A.2d 848, 856 (D.C. 1973), we had permitted taxpayers who had bypassed the administrative process to proceed with an action in court *in part* because those taxpayers had " 'no meaningful ability to challenge [the] assessment at all' " at the administrative level. *Id.* at 734 n.11. However, in *Keyes* we emphasized that the futility of the administrative appeal was only one of the several "extraordinary circumstances" on which we had based the *Green* decision; that "only injunctive relief was sought"; and that "it would be a rare instance when taxpayers would not bypass [the administrative procedure] at great peril." *Id.*[5]

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distinguishable: it involved a broad statute expressly permitting notice of a claim against the District to be given by the claimant's agent. *Id.* at 336-37; 566 F.2d at 228-29. Moreover, the court in *Dellums* found that notice by agent would not conflict with the purposes of that claim requirement; whereas, in this case, the purposes of the limitation period discussed *infra*, at 8-9, would not be served by a departure from the express terms of the statute or by a holding that "substantial compliance" satisfies the statute.

[5] Appellants also cite to *Thorn v. Jefferson County*, —— Ala. ——, 375 So. 2d 780 (Ala. 1979), where the Supreme Court of Alabama held that the administrative remedy need not be exhausted when a class action is brought challenging a tax as illegal and void. However, the court in *Thorn* relied upon *Graves v. McDonough*, 264 Ala. 407, 88 So. 2d 371 (1956), where the administrative remedy provided by statute gave aggrieved taxpayers only twenty days in which to object to the tax, as compared with the three-year period for filing claims under § 47-1586j.

Instead, we explained in *Keyes* that the extraordinary equitable considerations were not present which had led us in *Green* to permit a limited exception to an essential requirement of the purely statutory refund procedure. Nor are they present in the instant case. It was not until October 17, 1977, that the tax in question in this case was initially held unlawful—a year and one half after it first came due for the 1975 tax year. An appeal was taken promptly from that ruling. Thus it is not unreasonable to conclude that aggrieved taxpayers had ample opportunity prior to the ruling of October 17, 1977, to pursue their statutory remedy with some hope that they might be successful. Even following the trial court decision upholding the tax, the possibility of reversal endured until the appeals process was completed.[6] During the period of litigation, extensive efforts were exerted, by mail and by publication, to inform taxpayers of the need to file a claim; and the trial court expressly held such notice to be sufficient. The trial court's orders of October 27, 1977 and January 3, 1979 made it clear to appellants that individual claims for refund were a necessary precondition to collecting refunds, yet appellants did not appeal from those orders. In fact, appellants conceded the necessity of claims for refund soon after the October 27 order issued. (Record at 84-85.)

In addition, although without question the District had "notice" of the class action challenging the legality of the tax, absent the expected filing of claims at the administrative level, the District could not know the full extent of its liability for refunds and could not plan its budget accordingly. As we noted in *Keyes, supra*, 362 A.2d at 736-37, the financial interests of the District and the public interest would not be served by allowing taxpayers in such a case to bypass the statutory procedures for refund.

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[6] Accordingly, we do not find persuasive appellants' argument that a requirement of strict compliance with the statute is fundamentally unfair.

Finally, appellants cite to *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and urge (Brief at 35) that even were we to conclude § 47-1586j required individual taxpayers for 1975 and 1976 to file refund claims, nevertheless the three-year limitation period for filing the administrative claims should be deemed tolled from the time the class action was filed in April 1976 until this court's ruling on appeal as to the applicability of § 47-1586j to the instant case. Appellants also cite two decisions in class action discrimination cases, *see, e.g., Barrett v. United States Civil Service Commission*, 439 F. Supp. 216 (D.D.C. 1977), in which the equitable tolling doctrine for class actions has been held to toll the limitations period for administrative complaints. However, in determining in any given instance whether a statute of limitations should be tolled, we must examine the legislative purposes behind the limitation provision to determine whether they are effectuated by the tolling. *Timoni v. United States*, 135 U.S. App. D.C. 407, 412, 419 F.2d 294, 299 (1969), *citing Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 426 (1965).

The policy considerations which favor a tolling of the limitation periods in discrimination suits brought under remedial statutes are not present in the context of a challenge to a tax statute. As we have said, *supra* at 6, tax statutes are to be strictly construed. In addition, one of the important purposes served by the three-year filing deadline for tax refund claims is a practical one—to protect the District against financial instability by setting a date certain by which the District may know the precise extent of its liability for refunds. *See supra*, at 8; *District of Columbia v. Keyes, supra*, 362 A.2d at 736-37.

Moreover, implicit in the Supreme Court's opinion in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), was the view that tolling is proper with respect to a particular cause only for so long as the class action continues to protect that cause. Once a final ruling adverse

to the class is entered and becomes appealable, tolling is no longer proper.[7]

Here, the trial court in October 1977 ruled that those taxpayers who paid the tax for 1975 were entitled to refunds "provided they have complied with or comply with . . . § 47-1586j." In January 1979, the trial court ruled that appellant Kleiboemer's claim for refund filed on behalf of the class did not comply with § 47-1586j. Thus, the issue of the applicability of § 47-1586j to the members of the class was raised early on and was susceptible to appeal by appellants.[8] Under these circumstances we cannot agree that compliance with the statute

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[7] In *United Airlines*, the Supreme Court held that, where class certification had been denied early in a case but was not appealable until final judgment, and where the named parties had declined to appeal from that order, post-judgment intervention by putative class members was permissible for purposes of appealing the denial of class certification. 432 U.S. at 394-96. In so holding, the Court noted that, once the order became final and appealable, it was "critical" that the appeal was taken promptly: "In short, as soon as it became clear . . . that the interests of the unnamed class members would no longer be protected . . . [respondent] promptly moved to intervene to protect those interests." *Id.* at 394.

[8] To be appealable, an order must be final. D.C. Code § 11-721(a) (1981). However, final orders for purposes of the statute are not limited to final judgments which terminate the action. *Frost v. Peoples Drug Store, Inc.*, 327 A.2d 810, 812 (D.C. 1974). The test of finality is whether the orders requiring individual compliance with § 47-1586j disposed entirely of that issue; or whether they were "open, unfinished, or inconclusive," or were "but steps towards final judgment." *See Crown Oil and Wax Company of Delaware v. Safeco Insurance Co. of America*, 429 A.2d 1376, 1379 (D.C. 1981); *Trilon Plaza Co. v. Allstate Leasing Corp.*, 399 A.2d 34, 37 (D.C. 1979), *quoting Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). Applying these principles to the two orders here, we conclude that they were final and appealable with respect to the applicability of § 47-1586j to the instant case. We do not view the October 27 order as having reconstituted the class for purposes of challenging the legality of the tax.

was tolled solely by reason of the fact that appellants pursued their challenge to the validity of the tax.

Accordingly, we find no error in the trial court's September 1981 ruling that the timely filing of individual claims for refund at the administrative level was a prerequisite to recovery of refunds following this court's decision that the tax was unlawful.

III

We turn next to the second statute in question, § 47-2413 (c), which provides in pertinent part as follows:

> [I]f it is determined by the . . . Superior Court that there has been an overpayment of any tax . . . interest shall be allowed and paid on the overpayment . . . *from the date the overpayment was paid until the date of refund*, but with respect to that part of any overpayment which *was not assessed and paid as a deficiency or as additional tax interest shall be allowed and paid only from the date of filing a claim for refund or a petition to the Superior Court* . . . .

(Emphasis added.) The trial court here concluded that under the statute interest on the District's refund of taxes paid by the nonresidents (and determined to have been unlawfully imposed) was to be computed only from the date each such taxpayer filed his claim for refund rather than from the date such taxpayer paid the tax which this court invalidated. Appellants concede (Brief at 43) that most of the taxpayers who paid the tax did *not* pay as the result of an assessment of deficiency by the District. Accordingly, we are constrained by the express language of the statute set forth above to uphold the trial court's ruling that interest on the taxpayer's payment of the tax, not assessed as a deficiency or as additional tax, must run from the date the taxpayer filed a petition or claim for refund, rather than from the date the taxpayer overpaid the tax.

However, appellants (Brief at 43) point to the fact that they filed in the trial court pleadings challenging the validity of the tax at issue "prior to April 15, 1976, the earliest date on which any of the taxes involved were deemed to have been paid." They argue from this fact that the District was "apprised" at this early date of its potential liability to the taxpayers for the return—with interest—of the tax paid, should it be declared to have been illegally imposed. Therefore, appellants urge, they met the purpose of the statute, as reflected by its history,[9] *viz.*, to alert the District to its potential liability; and that by reason of the petitions filed interest should be paid from the date of overpayment or the due date of the return, whichever is later.[10]

The House and Senate committee reports do not, in our view, suggest that § 47-2413(c) should be given any construction other than its plain meaning. They refer to the District's being apprised of the fact that "an" overpayment has been claimed, thus suggesting that individual claims or petitions were intended. Further, the language of the committee reports does not indicate that

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[9] *See* H.R. REP. No. 1977, 82d Cong., 2d Sess. 4 (1952); S. REP. No. 1471, 82d Cong., 2d Sess. 4 (1952).

[10] Appellants also point to the fact that the statute refers to the filing of either a claim *or* a petition to the Superior Court, and that the words "by the taxpayer," included in § 47-1586j, are conspicuously absent from § 47-2413(c). (Reply Brief at 8.) It is therefore arguable that the class action petition filed by appellant Kleiboemer triggered the allowance of interest for the entire class. However, we must construe the statute as a whole, in context, according to common understanding of its terms. Although § 47-2413(c) does not expressly require that a petition or claim be filed "by the taxpayer," it refers only to "an" overpayment or "the" overpayment, and references in every other subsection of § 47-2413 are to "the taxpayer." Moreover, there is no indication whatsoever in the legislative history of § 47-2413 that Congress had anything other than the filing of a claim or petition by the individual taxpayer in mind when it enacted § 47-2413.

mere notice that the taxing statute has been challenged will be sufficient to comply with § 47-2413(c). Individual claims are needed, as we have discussed, *supra* at 8-9, so that the District will know the exact amount of refunds actually claimed and can plan accordingly. Since we are interpreting and applying a statute which is clear on its face, and since appellants have not persuaded us that the language of the statute admits of more than its natural meaning, we are obliged to apply § 47-2413(c) as written. *Caminetti v. United States*, 242 U.S. 470, 485 (1917); 2A Sutherland, Statutes And Statutory Construction § 46.01 (1973).

Therefore, we also affirm the trial court's ruling that interest on the amounts refunded to the taxpayers in the instant case who did not pay the tax because of an assessment of deficiency runs from the respective dates they filed their claims for refund, rather than from the dates they paid the tax.

Accordingly, there being no error in either of the challenged rulings, the judgment of the trial court is affirmed.

So ordered.

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 79-123, 79-547, and 81-1232

AXEL-FELIX KLEIBOEMER, RICHARD A. BISHOP, *et al.*,
Appellants,

v.

DISTRICT OF COLUMBIA,
Appellee.

Appeal from the Superior Court of the
District of Columbia

(Hon. John D. Fauntleroy, Trial Judge)

(Argued November 3, 1982 Decided September 7, 1983)

Bradley G. McDonald, with whom *Philip L. Kellogg*, *James L. Lyons*, *John M. Bixler*, and *Ronald D. Aucutt* were on the briefs, for appellants.

Richard L. Aguglia, Assistant Corporation Counsel, with whom *Judith W. Rogers*, Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel, and *James E. Lemert*, Assistant Corporation Counsel, were on the brief, for appellee.

Before KERN, PRYOR and BELSON, *Associate Judges.*

SUPPLEMENTAL OPINION UPON APPELLANTS' PETITION FOR REHEARING

The division in its opinion issued on March 22, 1983 characterized, prophetically as it turns out, this case as "the residuum of . . . convoluted litigation." *Kleiboemer v. District of Columbia*, 458 A.2d 731, 732 (D.C. 1983). Appellants in their petition for rehearing point out two misstatements which crept into the opinion through clerical error, *viz.*, two references to the trial court's October

17, 1977 order as holding the tax at issue "unlawful" when in fact the court held the tax lawful. Appellants also point to an error in the statement of facts undergirding this court's conclusion that the trial court's judgment should be affirmed. Appellants, hereafter denominated petitioners, urge that such errors materially influenced the outcome of the appeal and require reconsideration by the division of its holding, as well as suggest that certain of their arguments were not fully considered.

First, dealing with the clerical errors to be corrected, the word "unlawful" appearing in the middle of the first full paragraph in Part I of the division opinion, 458 A.2d at 732, describing the trial court's order, should have read "lawful"; and the word "unlawful" appearing on the ninth line of the last paragraph on 458 A.2d at 734 also should have read "lawful."

Next, we turn to the petitioner's assertion of factual error with respect to the orders entered by the trial court in the instant case.

I.

There were three orders of the trial court relating to the requirement for individual administrative claims as a prerequisite to taxpayers' collecting refunds. On October 27, 1977, in ordering refunds for certain fiscal year taxpayers, the court stated that those taxpayers were entitled to refunds "provided they have complied with or comply with D.C. Code 1973, § 47-1586j." The taxpayers did not appeal from that order. On January 3, 1979, the trial court ruled that Kleiboemer's claim for refund on behalf of the class did not comply with § 47-1586j or with the order of October 27, 1977. A timely appeal was taken from the January 3 order on January 19 (No. 79-123) and again on May 7, 1979 (No. 79-547).[1] On Sep-

[1] The appeal taken on January 19 was an appeal only from the January 3 order. The second appeal was taken following the trial court's decision of the case-in-chief and was consolidated with the first appeal.

tember 24, 1981, the trial court ruled that timely individual administrative claims were a prerequisite for refunds, and that interest was to be computed from the date of the individual claims. A timely appeal was taken from that order (No. 81-1232) and was consolidated with the earlier appeals from the January 3 order.

The division stated in its opinion that an appeal was taken only from the September 24, 1981 rulings and that neither the October 27, 1977 order nor the January 3, 1979 order was appealed; in fact, the January 3 order *was* appealed.

The division concluded, 458 A.2d at 734 n.4, that the class claim for refund filed by Kleiboemer does not satisfy § 47-1586j because (a) the plain language of the statute requires individual claims, (b) petitioners "did not appeal from the January 3 order," and (c) *Dellums v. Powell*, 184 U.S. App. D.C. 324, 566 F.2d 216 (1977), *cert. denied*, 438 U.S. 916 (1978), cited in petitioners' brief on appeal, is distinguishable. Petitioners contend that, because the court viewed this issue as waived by failure to appeal, it was never considered on the merits, and the California cases cited in their brief were never considered.

However, the essential reason for the division holding was that the plain language of the governing statute required it. The additional two reasons referred to above were more in the nature of persuasive discussion. Moreover, the two principal California cases which petitioners contend the division should have discussed in the opinion are not precisely on point. *San Jose v. Superior Court of Santa Clara County*, 12 Cal. 3d 447, 525 P.2d 701 (1974); *Lattin v. Franchise Tax Board*, 75 Cal. App. 3d 377, 142 Cal. Rptr. 130 (1977). The *San Jose* case concerned a statutory claim requirement as a prerequisite to the maintenance of a class action for damages, not as a prerequisite to collecting a tax refund. The statute at issue in that case (apparently a general claims statute), unlike

the District of Columbia tax statute at issue here, expressly permitted a claim to be filed "by the claimant *or by a person acting on his behalf.*" *San Jose, supra* at 12 Cal. 3d at 455, 525 P.2d at 706 (emphasis added). The *Lattin* case was very closely analogous to *District of Columbia v. Keyes*, 362 A.2d 729 (D.C. 1976), *cert. denied*, 430 U.S. 968 (1977), in that it concerned the requirement of an administrative claim for refund as a prerequisite to maintaining a class action challenging the validity of the tax, in contradistinction to an ancillary suit seeking recovery once the tax has been held invalid. *Lattin* relied almost entirely upon the *San Jose* case in holding that the administrative claim requirement would be satisfied for purposes of class action certification by a claim filed on behalf of the class.[2] As with the *San Jose* case, the context was thus different from that of the instant case, where the class action suit has already been decided and the issue is instead whether individual claims are required for recovery.

Further, although petitioners contend that the pertinent tax statute involved in *Lattin* was virtually identical to § 47-1586j, they cited only the portion of the California tax code which, like *part* of § 47-1586j, requires the claim to be in writing and to state the specific grounds for the claim. Petitioners did not mention that portion of the California tax code which, like § 47-1586j, requires a claim for refund to be filed "by the taxpayer."[3]

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[2] Although the court in *Lattin* referred to the suit as seeking refunds for the class, the court stated that " 'the sole issue presented on this appeal is whether or not a class should be certified and represented by Appellants Lattin.' " 75 Cal. App. 3d at 379, 142 Cal. Rptr. at 132. The plaintiffs in that case sought to have the applicable California tax statute declared unconstitutional.

[3] Petitioners cited (Brief at 32) CAL. REV. & TAX CODE § 19055 (West 1970). The pertinent section of the California code, Cal. Rev. & Tax Code § 19053 (West Supp. 1970-82), *does*, like the D.C. Code, require a claim to be timely filed "by the taxpayer." However, as discussed above, *Lattin* dealt with the necessity of a

Moreover, the policy considerations underlying both those California cases was governmental immunity, not exhaustion of administrative remedies. Those opinions held that substantial compliance with the claims statutes by the filing of a class claim was sufficient, but, as we have explained, for different purposes than in the instant case. Finally, even if we viewed those cases as persuasive, this court certainly need not follow them.

In reciting the factors in this case which weigh against permitting an exception, pursuant to *District of Columbia v. Green*, 310 A.2d 848, 856 (D.C. 1973), to the requirement that an administrative claim be filed, as a prerequisite to suit, the division states, 458 A.2d at 735, in part incorrectly, that petitioners did not appeal from the October 27 and January 3 orders which made it clear that individual claims were required. Petitioners do not specifically address how this particular error here may have affected the rationale. However, deletion of the erroneous statement of fact from the opinion affects the list of equitable factors in this section only minimally. We are still left with the following:

> The tax was not initially held lawful until a year and one-half after it came due and that decision was promptly appealed, so that taxpayers might have pursued their administrative remedies with some hope of success.[4]

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claim's having been filed and rejected as a precondition to maintaining a lawsuit to recover upon payment of a tax which is void, presumably pursuant to Cal. Rev. & Tax Code § 19082 (West 1970) (creating the right of action after claim denied if tax void). *Lattin* did not concern the claim as a precondition actually to collecting a refund if the class suit were successful, as here; and the court in *Lattin* did not construe the California code provision which is the companion to that portion of § 47-1586j at issue in this case.

[4] The argument is made that once the trial court upheld the tax, most taxpayers would not likely have filed a claim at all, considering it pointless. It was not until 5 days after the expiration of the statutory period for filing claims for the 1975 tax year that a

Extensive notice of the claim requirement was given in the media, in business and professional publications, by mail, and in seminars.

The trial court expressly held this notice to be sufficient.

No appeal was taken from the October 27 order first giving petitioners notice that individual claims were required (and petitioners appeared to understand that the October 27 order did require individual claims).

At 458 A.2d at 735-36, in the discussion of equitable tolling, we explain that tolling is no longer proper once a final ruling adverse to the class is entered and becomes appealable (and is not appealed). We then reason, 458 A.2d at 736 n.8, that the October 27, 1977, and January 3, 1979, orders were final and appealable with respect to the applicability of § 47-1586j and that tolling is not proper (since they were not appealed). Petitioners maintain that the division's decision on equitable tolling was materially and adversely influenced by the incorrect assumption that the January 3 order was not appealed when it was, in fact, promptly appealed.

Since the October 27 ruling was in the context of an order directing refunds for only a limited group of these taxpayers (1975 fiscal-year basis taxpayers), it might not be viewed, standing alone, as resolving the issue sufficiently for *all* affected taxpayers as to make clear that the class action would no longer protect their interests in this respect if the order were not appealed. *See Kleiboemer, supra*, 458 A.2d at 735-36 n.7. Also, considering how the October 27 order was worded ("provided that" the taxpayers comply with the claim requirement), and considering that this part of the order *apparently*

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division of this court held the tax unlawful. However, this argument must be viewed in light of the considerable publicity surrounding this litigation and the claim requirement.

was not a major controversy, if at all, at the time (since the focus was on the validity of the tax), we recognize that the decision as to whether it was a final, appealable order was a close one. Further, petitioners contend that the October 27 order left open the question whether a class claim for refund satisfied § 47-1586j.

However, we still conclude that the October 27, 1977, order constituted a final order which should have been appealed if petitioners were to avail themselves of equitable tolling. Accordingly, since the filing deadline for the 1975 tax year did not expire until a year and one-half later, on April 15, 1979, equitable tolling is not appropriate. The order certainly settled the question finally for the taxpayers who were to get refunds at that time, and it put the petitioners on clear notice that compliance with § 47-1586j was required. The trial court cited *Keyes* in its October 27 order, and in so doing, it further signaled that individual compliance was contemplated, because *Keyes* emphasized strict construction of tax refund statutes. The fact that petitioners vigorously pursued various avenues for notifying individual taxpayers of the requirement (even though they urged the sufficiency of a class claim) indicates that they understood the October 27 order, literally read, to require individual claims.

II.

Finally, we turn to several additional assertions of error raised in the petition for rehearing:

At 458 A.2d at 735, the division states that "appellants conceded the necessity of claims for refund soon after the October 27 order issued." We cite to petitioners' motion for an order compelling the District to include notice to taxpayers of the filing requirement in the December 1978 tax mailings. Petitioners argue that they took such action only out of an abundance of caution, to protect their clients' interests. However, in that motion petitioners referred to the October 27 order and described the

administrative "claims" (not singular, as if they believed a single class claim might suffice) as being "necessary." Since only the petitioners themselves can say how they construed the October 27 order at that time, perhaps to say that they "conceded" the issue was to use too strong a word. However, their actions in pursuing individual notice, and their language in this motion, are a fair indication that they understood individual notice to be required and therefore should have appealed the October 27 order. The District cites to the transcript of October 7, 1978, at 39, where counsel for petitioner described the October 27 ruling as specifically requiring the "members of the class" (not the class as an entity) to comply with § 47-1586j, as support for this reading as to how the October 27 ruling was understood by petitioners.

Petitioners contend as well that the division opinion failed to address their argument that members of the class, having been bound by the trial court judgment adverse to them until this court reversed it (*after* the statutory period for claims expired), would be denied due process if they were denied the benefits of this court's final judgment holding the tax illegal. This argument was made in less than 3 pages of a 49-page brief. No cases were cited in direct support of the argument, and it was essentially urged that it would be extremely harsh and fundamentally unfair to reach the result the division did reach. This argument *was* addressed in the division opinion, 458 A.2d at 735 n.6, in which we state that, because the trial court decision was appealed and subject to reversal, this contention was unpersuasive. We remain of that view.

Petitioners also make several arguments in which they urge that the division erred in concluding that interest on the amounts refunded to most taxpayers runs from the dates they filed individual claims for refund, rather than from the dates they paid the tax. We have thoroughly considered each of petitioners' arguments on the

interest issue and find them insubstantial.[5] The division opinion rests upon a straightforward reading of D.C. Code § 47-2413(c) (1973).

In sum, therefore, each of petitioners' assertions of error is either unfounded or had no substantial impact upon the division's holdings. Accordingly, the petition for rehearing is denied.

So ordered.

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[5] Petitioners maintain that the division opinion disregards the differences between subsection (c) and other subsections of § 47-2413. However, it is precisely because the other subsections of § 47-2413 pertain to subject matter affecting only individual taxpayers that we concluded subsection (c) also must concern only individual taxpayers. Petitioners also argued at length that the fiscal concerns of the District are entirely different with respect to interest than in the context of the main claim for a refund. However, this argument overlooks the fact that a greater sum of money is at stake for the District on the interest issue than on the question of recovery on the main claims. Brief for Appellee at App. 1. With respect to petitioners' contentions concerning the use of legislative history in the division opinion, we note that the language of § 47-2413(c), in the context of the entire section, has a plain and natural meaning. Petitioners' position, *viz.*, that the petition filed in April 1976 in this case fulfilled the statutory requirement, is arguable only because of the omission of specific reference to the individual taxpayer.

APPENDIX C

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
TAX DIVISION

Docket No. 2379

AXEL-FELIX H. KLEIBOEMER,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

ORDER GRANTING PETITIONER'S MOTION FOR CLASS DETERMINATION

Upon consideration of petitioner's Motion for Class Determination, respondent's response thereto and good cause appearing therefore, the Court finds as follows:

1. The class is so numerous that joinder of all members is impracticable.

2. There are questions of law and fact common to the class.

3. The claims of the representative party are typical of the claims of the class.

4. The representative party will fairly and adequately protect the interests of the class.

5. The within suit is maintainable as a class action pursuant to the provisions of Rules 23(b)(1)(A) and 23(b)(1)(B) of the Superior Court Civil Rules.

WHEREFORE, IT IS HEREBY ORDERED by the Court this 17th day of October, 1977, that the within cause of action may and shall be maintained as a class action; and it is

FURTHER ORDERED that the class shall consist of all non-residents who are subject to the tax in question by virtue of engaging in unincorporated personal service businesses in the District of Columbia and who have paid the tax.*

/s/ John Garrett Penn
JOHN GARRETT PENN
Judge

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* After reviewing Super. Ct. Civ. R. 23 and the applicable cases, this Court is satisfied that petitioners can maintain this action as a class action under Rule 23(b)(1)(A) and arguably under Rule 23(b)(1)(B). The Court relies only on Rule 23(b)(1)(A). cf. *McDonnell Douglas Corp.* v. *United States District Court for the Central District of California*, 523 F.2d 1083 (9th Cir. 1975); *Landau* v. *Chase Manhattan Bank, N.A.*, 367 F. Supp. 1992 (SD NY 1973); *Goldman* v. *First National Bank of Chicago*, 56 FRD 587 (ND Ill. 1972). Here as distinguished from the above cases, the failure to maintain a class action would impose incompatible standards of conduct on the District of Columbia. This is not a simple action for a money judgment but rather a case which calls into question a tax statute of the District. It is therefore possible that a contrary opinion could impose upon the District incompatible standards of conduct; collecting the tax from some and not from others. Moreover, this Court cannot overlook the impact on the fiscal affairs of the District of Columbia in the event of inconsistent decisions. For these reasons the Court concludes the case is properly brought under Rule 23(b)(1)(A).

As to petitioner Bishop, he has requested that he not be included as a member of this class. While to allow him to opt out of a 23(b)(1) action is unusual, the problems of opting out are not involved here since Bishop has actually joined with Kleiboemer and both cases have been presented on joint records and joint arguments.

APPENDIX D

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
TAX DIVISION

Docket No. 2379

AXEL-FELIX KLEIBOEMER,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

[Filed Oct. 27, 1977]

ORDER

Pursuant to the Opinion and Order entered in this case on October 18, 1977, as modified by the Memorandum Order, entered on October 27, 1977, it is hereby

ORDERED that the class consists of those non-resident taxpayers who have paid the unincorporated business franchise tax pursuant to D.C. Code 1973 Sec. 47-1574b (Supp. IV 1977), except for Richard A. Bishop (see Tax Docket No. 2362), and it is further

ORDERED that the petitioner, Axel-Felix Kleiboemer, is hereby granted a refund for the franchise tax he paid for the period January 1, 1975 through November 30, 1975, together with interest as provided by law, and it is further

ORDERED that the members of the class shall be entitled to refund of taxes, consistent with the Opinion and Order as modified by the Memorandum Order, pro-

vided they have complied with or comply with D.C. Code 1973, Sec. 47-1586j.*

/s/ John Garrett Penn
JOHN GARRETT PENN
Judge

Dated: October 27, 1977

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* Cf: *D.C.* v. *Keyes*, 362 A.2nd 729 (D.C. App. 1976).

APPENDIX E

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
TAX DIVISION

Docket No. 2379

AXEL-FELIX KLEIBOEMER,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

[Filed Mar. 23, 1979]

ORDER

Upon consideration of the report regarding the feasibility of identifying class members who were not previously mailed a notice pursuant to this Court's order of December 20, 1978, and of the supplemental pleadings of the parties and argument of counsel, it is hereby

ORDERED, that respondent District of Columbia shall, not later than March 22, 1979, issue a press release to the various District of Columbia media in its normal manner,* notifying members of the class who were not previously mailed a notice pursuant to this Court's order of December 20, 1978, of their right to file claims for refunds respecting 1975 and subsequent tax years.

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* In the normal course of business, the District's press releases are dispatched to the Washington Post, Washington Star, Associated Press, UPI, 6 local weeklies (e.g., the Afro-American), the four major television stations and approximately 12 local radio stations by any one or all of the following three methods: a recording line, mailings and/or by actual delivery of the press release to the press room in the District Building.

Such press release shall consist of an announcement indicating its general purpose, that is, to notify those class members who were not reached by the District's December, 1978 mailing of their right to file claims for refunds respecting 1975 and subsequent tax years. A copy of the notice mailed in December, 1978 shall be appended to the announcement; and it is further

ORDERED, that if the notice information in the press release described above is disseminated *in any reasonable manner* by one of the two major local newspapers (the Washington Post or the Washington Star), no further notice to the affected class members shall be required. If the press release described above is not disseminated by either of the two major local newspapers (the Washington Post or the Washington Star), *in any reasonable manner*, but by various other news media as described in this Order, whether further notice to affected class members shall be required is at the discretion of the Court.

/s/ John Garrett Penn
JOHN GARRETT PENN
Judge

3/21/79.

APPENDIX F

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
Tax Division

Docket No. 2379

AXEL-FELIX KLEIBOEMER,
Petitioner,
v.
DISTRICT OF COLUMBIA,
Respondent.

[Filed Apr. 6, 1979]

ORDER

Upon consideration of this Court's order of March 21, 1979 (filed March 23, 1979), and it appearing to the Court that the District of Columbia issued a press release to the various District of Columbia media notifying members of the class who were not previously mailed a notice pursuant to this Court's order of December 20, 1978, of their right to file claims for refunds respecting 1975 and subsequent tax years; and it further appearing that the notice information in the press release was broadcast over three local radio stations (WHUR, WOOK, WGMS), and published in the Washington Informer on March 29, 1979, and in the Washington Post on April 5, 1979, it is hereby

ORDERED, that the notice information of the District of Columbia's press release was disseminated in a reasonable manner within the meaning of this Court's order of March 21, 1979; that no further notice to the affected class members shall be required pursuant to this Court's order of March 21, 1979; and that counsel for the class members have fulfilled their obligations to the class as regards informing the class of the necessity to file claims for refunds.

/s/ John Garrett Penn
Judge
April 5, 1979

APPENDIX G

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF FINANCE AND REVENUE

[SEAL]

Associate Director for
Audit, Compliance &
Investigation Administration

June 25, 1982

MEMORANDUM

TO: Richard L. Aguglia
Assistant Corporation Counsel

FROM: J. Walter Lund
Associate Director

SUBJECT: Professional Tax Refund

Per your request of June 17, 1982, information concerning professional tax refunds as of June 24, 1982 is as follows:

I. *Amount of claims and refunds paid, by year:*

TAX YEAR	NUMBER OF CLAIMS	DOLLARS
1975	1035	$ 4,044,823.57
1976	1290	5,488,567.29
1977	1884	6,333,133.34
1978	1860	7,380,758.81
1979	1197	6,029,550.39
1980	238	1,002,587.44
1981	13	17,705.82
	7517	$30,247,126.66

II. *Number of taxpayers (claims who failed to file, by year:*

TAX YEAR	NUMBER OF CLAIMS	DOLLARS (*Estimated)
1975	99	$ 25,245.00
1976	506	68,101.00
1977	429	113,146.00
1978	407	92,895.00
1979	110	13,728.00
1980	-0-	-0-
	1551	$ 313,115

III. *Number of taxpayers (claims who filed too late, by year:*

TAX YEAR	NUMBER OF CLAIMS	DOLLARS**
1975	444	$ 459,784.00
1976	716	1,034,459.00
	1160	$1,494,243.00

* Based on known businesses. Estimate based on judgment of income to be attributed to D.C. residents. These figures do not include potential claims from other firms or individuals.

** Includes interest computed to June 1, 1982.

If you have any questions on this material, please call me.

JWL/rap

cc: Carolyn L. Smith

APPENDIX H

CLAIM FOR REFUND OF DISTRICT OF COLUMBIA UNINCORPORATED BUSINESS TAX

To: GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Finance and Revenue
Tax Audit and Liability Division
300 Indiana Avenue, N.W.
Washington, D.C. 20001

1. *Introduction.* By petition filed in the Tax Division of the Superior Court of the District of Columbia April 5, 1976, petitioner Axel-Felix H. Kleiboemer, appealed the denial of his claim for refund of amounts paid pursuant to the District of Columbia Unincorporated Business Tax, 47 D.C. Code § 1574, *et seq.*, on behalf of himself and all members of the class of similarly situated taxpayers. By order entered October 17, 1977, Judge John Garrett Penn directed that the case would be maintained as a class action. By subsequent order entered October 27, 1977, Judge Penn directed that all members of the class were entitled to refund of amounts paid pursuant to the tax for the period January 1 through November 30, 1975, provided the members of the class complied with the provisions of 47 D.C. Code 1586j.

2. *Identification of Taxpayers.* This claim for refund is made on behalf of all non-residents who are subject to the District of Columbia Unincorporated Business Tax by virtue of owning and engaging in the conduct of unincorporated personal service businesses in the District of Columbia and who have paid the tax, except for Richard A. Bishop (see Tax Docket No. 2362). See orders of Judge Penn dated October 17, 1977, October 18, 1977, and October 27, 1977, attached.

3. *Amounts to Be Refunded.* All amounts paid by the class of taxpayers identified above pursuant to the D.C.

Unincorporated Business Tax, 47 D.C. Code 1574, *et seq.*, from January 1, 1975, to and including the date of filing of this claim for refund, and appropriate interest.

4. *Kind of Tax.* The D.C. Unincorporated Business Tax, 47 D.C. Code 1574, *et seq.*

5. *Grounds for Claim for Refund.*

A. As to all amounts paid for the period January 1, 1975, through November 30, 1975: the tax is illegal because it unconstitutionally discriminates between calendar year and certain fiscal year taxpayers, as per Memorandum Order of Judge Penn dated October 27, 1977.

B. As to all amounts paid for the periods from January 1, 1975, through the date of filing of this claim for refund:

(1) The tax is prohibited by 1 D.C. Code 147(a)(5), (1973 ed., Supp. V, 1978);

(2) The tax denies these taxpayers due process and equal protection of the laws as guaranteed by the United States Constitution; and

(3) The tax was enacted without "adequate public notification" as required by 1 D.C. Code 144(c) (1973 ed., Supp. V, 1978).

/s/

Co-Counsel for Petitioner Kleiboemer and the class designated by orders of Judge Penn dated October 17, 1977, and October 27, 1977, *Kleiboemer* v. *District of Columbia*, Tax Docket No. 2379.